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8 UNITED STATES DISTRICT COURT

9 CENTRAL DISTRICT OF CALIFORNIA

10 WESTERN DIVISION

11 L.A. PRINTEX INDUSTRIES, INC., a
California Corporation,

12 Plaintiff,

13 vs.

14 LE CHÂTEAU, INC., a Canadian
15 Corporation; and DOES 1-10,

16 Defendants.

CASE NO. CV10 4264-ODW (FMOx)

**NOTICE OF MOTION AND
MOTION FOR SUMMARY
JUDGMENT;**

**DECLARATION OF DAVID W.
QUINTO; STATEMENT OF
UNCONTROVERTED FACTS AND
CONCLUSIONS OF LAW; AND
[PROPOSED] ORDER FILED
CONTEMPORANEOUSLY
HEREWITH**

18 Date: May 23, 2011

19 Time: 1:30 p.m.

Crtrm.: 11

20 Judge: Honorable Otis D. Wright II

21 TO PLAINTIFF AND ITS ATTORNEYS OF RECORD:

22 PLEASE TAKE NOTICE that on May 23, 2011, at 1:30 p.m., defendant Le
23 Château, Inc. will, and hereby does, move the Court pursuant to Fed. R. Civ. P. 56
24 for an order granting summary judgment.

25 The Court lacks subject matter jurisdiction to hear plaintiff's copyright
26 infringement claims because plaintiff has alleged infringement of a single fabric
27 pattern registered with the United States Copyright Office only as one of a dozen
28

1 works registered as a published collection when there is no evidence that the
2 registered works were, in fact, published as a collection. Even if the pattern at issue
3 had been published as part of a collective work, Le Château would nonetheless be
4 entitled to judgment as a matter of law because the copying of a single element of a
5 collective work does not infringe the “collection” and there is no “substantial
6 similarity” between the collection and plaintiff’s use of a pattern comprising just
7 8.5% of the collection.

8 This motion is based on this notice; the accompanying Memorandum of
9 Points and Authorities; the Separate Statement of Undisputed Facts and Conclusions
10 of Law; the Declaration of David W. Quinto dated April 22, 2011; any matters of
11 which this Court may take judicial notice; and any additional argument and evidence
12 as may be presented at the hearing of this matter.

13 **Statement of Rule 7-3 Compliance**

14 Plaintiff’s Refusal to Meet and Confer. As set forth more fully in the attached
15 Declaration of David W. Quinto dated April 22, 2011, paragraph 12, Le Château’s
16 counsel repeatedly requested that plaintiff’s counsel meet and confer concerning this
17 motion. In doing so, Le Château’s counsel explained that the motion would be
18 brought on the same grounds that plaintiff’s counsel briefed and argued in *United*
19 *Fabrics v. C&J Wear*, which was also the basis for plaintiff’s loss in *L.A. Printex*
20 *Industries, Inc. v. Aeropostale*. Following an extended e-mail exchange, plaintiff’s

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1 counsel maintained that they were “still not clear as to your requested relief” and,
2 accordingly, declined to meet and confer. *See* Exhibit N to the Declaration of
3 David W. Quinto dated April 22, 2011.

4 DATED: April 22, 2011

QUINN EMANUEL URQUHART &
SULLIVAN, LLP

By 

David W. Quinto
Attorneys for Defendant
Le Château, Inc.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **Preliminary Statement**

3 If, as here, a copyright infringement plaintiff alleges that a single published
4 work registered only as part of a published collection was infringed, the plaintiff
5 must show that the various works subject to the registration were in fact offered for
6 sale *as a collection*. Otherwise, the court lacks subject matter jurisdiction to hear
7 the claim. The reason why is obvious. The plaintiff cannot invoke the jurisdiction
8 of the federal courts on the basis that it has a collective work if its work is not in fact
9 a collective work.

10 Because they had lost other cases for precisely this reason, plaintiff and its
11 counsel have attempted to suppress evidence that the copyright at issue relates not to
12 1 work but to 12, as well as evidence that the 12 patterns at issue were never
13 marketed as a collective work. Absent such evidence, no federal court has subject
14 matter jurisdiction to hear plaintiff's claims. Those claims must therefore be
15 dismissed for this reason alone.

16 Even if plaintiff had published the 12 patterns it registered as a collection, Le
17 Château would not be liable for infringement as a matter of law because it is alleged
18 to have copied only a single pattern - as opposed to the collection - comprising just
19 8.5% of the collection. To prove infringement, a copyright plaintiff must prove that
20 the defendant's work is "substantially similar" to its own, but plaintiff cannot do
21 that. By definition, Le Château's work is 91.5% different from the collection at
22 issue.

23 Finally, the award of costs and attorney's fees is appropriate because plaintiff
24 knew that its claims were meritless long before it filed suit.

25 **Statement of Facts**

26 Plaintiff's complaint, filed June 9, 2010, alleges just two claims: copyright
27 infringement and vicarious and/or contributory copyright infringement. As reflected
28 in paragraph 9 of the Complaint, Le Château is alleged to have infringed a single

1 textile design pattern. Paragraph 10 of the complaint alleges that the textile design
2 pattern at issue was registered with the United States Copyright Office pursuant to
3 Certificate of Registration No. VA 1-344-916. The Registration Certificate,
4 attached as Exhibit 2 to the Complaint, reflects that it was issued December 19,
5 2005, for "Ethnic (Group 12)." The copyright registration certificate recites that
6 Ethnic (Group 12) was published December 7, 2005.

7 Because the Complaint attached a copy of but one pattern subject to the
8 copyright registration at issue, beginning in the summer of 2010 Le Château
9 repeatedly requested of plaintiff's counsel that it be permitted to inspect the
10 registration materials. However, all such requests were denied. Declaration of
11 David W. Quinto dated April 22, 2010 ("Quinto Dec."), ¶ 2.

12 On March 9, 2011, Le Château served its First Request for Production of
13 Documents and Things, seeking to discover what textile design patterns are subject
14 to the copyright registration certificate at issue herein. On April 8, 2011, plaintiff
15 served its responses, but did not produce any documents, instead advising Le
16 Château that the responsive documents could be examined at the offices of
17 plaintiff's counsel on April 19, 2011, at 11:00 a.m. When the documents were
18 ultimately produced, they consisted of 33 pages, of which the purported copyright
19 registration materials consisted of just 3 pages. The copyright registration materials
20 had been sanitized to remove evidence of the 11 other patterns subject to the
21 copyright registration. Quinto Dec., ¶¶ 2, 4-6 and Exhibits A, D and E thereto.

22 Le Château independently engaged a copyright search service to obtain a
23 deposit copy of the certificate of copyright registration at issue at a cost of almost
24 \$900. That certificate, attached to the Quinto Declaration as Exhibit G, reflects not
25 just the 1 pattern that plaintiff disclosed in its responses to Le Château's First Set of
26 Requests for Production of Documents and Things, but 12 patterns. Quinto Dec.,
27 ¶ 7.

28

On March 10, 2011, Le Château served its Second Request for Production of Documents and Things and First Set of Interrogatories. They were directed at discovering how and when plaintiff published the textile design pattern subject to the copyright registration certificate at issue. On April 12, 2011, plaintiff untimely served its responses and, notwithstanding that any objections were waived by its failure to timely respond, plaintiff refused to provide any information concerning how the 11 other textile design patterns subject to its copyright registration certificate were marketed or sold. Quinto Dec., ¶¶ 3, 9 and Exhibits B-C and Exhibits I-J thereto. Accordingly, plaintiff has failed to come forward with any evidence that the textile design pattern subject to its collective copyright registration were published *as a collection*.

Argument

I. SUMMARY JUDGMENT STANDARD

Summary judgment is "properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S. Ct. 2548, 2555 (1986) (quoting *Fed. R. Civ. P.* 1). Summary judgment should be entered when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P.* 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

Under *Celotex*, Le Château need not negate plaintiff's claims if it can show that plaintiff cannot meet its burden to prove them. Pursuant to Rule 56, "a moving defendant may shift the burden of producing evidence to the nonmoving plaintiff merely by 'showing' — that is, pointing out through argument — the absence of evidence to support plaintiff's claim." *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 532 (9th Cir. 2000). Moreover, if the factual context makes the non-moving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a

genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). No longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment. *California Architectural Building Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987).

II. THE COMPLAINT HEREIN SHOULD BE DISMISSED BECAUSE THE COURT LACKS SUBJECT MATTER JURISDICTION

This Court would have subject matter jurisdiction over plaintiff's copyright claims only if those claims arose under the U.S. Copyright Act. *See* 28 U.S.C. § 1338(a). But, as stated in the copyright registration certificate attached as Exhibit 2 to plaintiff's complaint, the pattern at issue was registered as part of a *published* work consisting of a collection of 12 patterns. As explained below, that registration is invalid because the 12 patterns were not published as a collection. Because the registration is invalid, all courts lack subject matter jurisdiction to hear plaintiff's claims.

That rule was stated clearly by the Ninth Circuit in a case argued by *plaintiff's* counsel herein, Scott Burroughs. In *United Fabrics International, Inc. v. C&J Wear, Inc.*, 630 F.3d 1255 (9th Cir. 2011), the Ninth Circuit held that:

When one registers a collection of works in a single copyright, it can be registered either as a "published" or an "unpublished" collection.

37 C.F.R. § 202.3(b)(4). A necessary element of a published-collection copyright is that the collection is sold, distributed or offered for a sale concurrently. *Id.*; 17 U.S.C. § 101.

Id. at 1258-59.

Plaintiff and its counsel were aware of the legal requirement that the 12 patterns be published as a collection well in advance of the Ninth Circuit ruling. For example, *before this case was filed*, in *L.A. Printex Industries, Inc. v. Aeropostale, et al.*, No. CD 08-07085 DDP (Ex), 2010 WL 2813800 (C.D. Cal. May 5, 2010),

1 Judge Dean D. Pregerson granted summary judgment against plaintiff on May 5,
2 2010, based on that very issue. In doing so, Judge Pregerson noted that L.A. Printex
3 "relies on its registration of Geometric (Group 4)—a group that contains, among
4 other patterns, the G70132 pattern at issue in this case—to satisfy the registration
5 element of its copyright registration claim." Citing *Kay Berry, Inc. v. Taylor Gifts,*
6 *Inc.*, 421 F.3d 199, 205 (3d Cir. 2005), Judge Pregerson observed that the "single
7 work registration requires. . . that all of the self-contained works be 'included in a
8 single unit of publication' and share the same copyright claimant." Judge Pregerson
9 found, however, that L.A. Printex "sold fabric bearing G70132 designs separately
10 from other designs in Geometric (Group 4)." He thus concluded that L.A. Printex
11 had "not produced competent evidence establishing that it holds a valid copyright
12 registration for the G70132 pattern" and therefore could not, "as a matter of law,
13 prevail on its copyright infringement claim."¹

14 Before that, Judge James V. Selna had ruled against Mr. Burroughs' client on
15 that issue as well. In *United Fabrics International, Inc. v. C&J Wear, Inc.*, No. CV-
16 08-1085 JVS (AJWx), Docket No. 148 (C.D. Cal. Aug. 18, 2009), Judge Selna
17 rejected the textile printer's argument that, "A single publication requirement is
18 unworkable for designs because customers come in sporadically, and may or may
19 not be interested in all of the designs in a copyright." Judge Selna observed that the
20 foregoing argument "ignores the fact that [a fabric pattern designer] has control over
21 what it publishes, when, and to whom." Because the various patterns subject to the
22 copyright registration were not published as a collective work, Judge Selna held that

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25 ¹ Le Château requests that the Court take judicial notice of the date, existence
26 and reasoning of Judge Pregerson's Order Granting Defendants' Motion for
27 Summary Judgment and Denying Plaintiff's Motion for Partial Summary Judgment
28 in *Aeropostale*. See Fed. R. Evid. 201. A true and correct copy of
Judge Pregerson's Order is attached to the Quinto Declaration as Exhibit K.

1 the plaintiff did "not have standing to allege copyright infringement of the subject
2 matter, which must be independently registered before this claim can be asserted."²

3 Seeking evidence concerning whether the 12 patterns subject to the copyright
4 registration at issue were, in fact, published as a collection, Le Château propounded
5 two sets of document requests on plaintiff, as well as one set of interrogatories.³
6 Le Château's First Request for Production of Documents and Things contained just
7 five requests. The first three requests sought production of:

- 8 • The deposit copy of YOUR COPYRIGHT registration application.
- 9 • All DOCUMENTS you sent to or received from the United States
10 Copyright Office in connection with the registration of YOUR
11 COPYRIGHT.
- 12 • Copies of all designs subject to YOUR COPYRIGHT registration.⁴

13 Plaintiff's written responses to those requests were identical:

14 Objection: Vague, calls for legal conclusion. This has
15 been or will be produced.⁵

16 Plaintiff nowhere indicated that any documents were being withheld. Nevertheless,
17 plaintiff did withhold critical documents.⁶

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20 ² Le Château requests that the Court take judicial notice of the date, existence
21 and reasoning of Judge Selna's Order Denying Plaintiff's Motion for Summary
22 Adjudication and Dismissing Action dated August 18, 2009, in *C&J Wear*. See Fed.
23 R. Evid. 201. A true and correct copy of that order is attached to the Quinto
Declaration as Exhibit L.

24 ³ Quinto Dec., ¶¶ 2-3 and Exhibits A-C thereto.

25 ⁴ Quinto Dec., ¶ 2 and Exhibit A thereto.

26 ⁵ Quinto Dec., ¶ 4 and Exhibit D thereto. The response to the third request
27 actually stated that: "This has been or will be produced for inspection upon
28 reasonable notice."

⁶ Plaintiff initially refused to provide copies of the 33 pages of documents it
agreed to produce and said, instead, that the documents could be inspected at 11:00
(footnote continued)

1 Attached to the Quinto Declaration as Exhibit F is the complete set of
 2 documents produced by plaintiff in response to Le Château's First Set of Requests
 3 for Production. The purported copyright registration materials appear on the pages
 4 marked by plaintiff as P28-P30.⁷

5 Knowing that plaintiff might refuse to produce the complete copyright
 6 registration materials, Le Château independently ordered a certified copy of them at
 7 a cost of almost \$900.⁸ A true and correct copy of the certified copy of the
 8 registration materials is attached to the Quinto Declaration as Exhibit G. In contrast
 9 to the registration materials produced by plaintiff that purport to show the
 10 registration of but 1 pattern, the certified copy reflects that 12 distinct patterns were
 11 registered.

12 Unsurprisingly, plaintiff has refused to produce any evidence at all
 13 concerning its purported publication or sale of the 11 additional patterns subject to
 14 the copyright registration at issue herein. Le Château's First Set of Interrogatories
 15 and Second Request for Production of Documents (Exhibits B and C to the Quinto
 16 Declaration), personally served on March 10, 2011, required the production of
 17 evidence concerning how each of the patterns subject to the copyright registration
 18 certificate at issue were marketed and sold. Notwithstanding that its responses were
 19 untimely served 33 days later, plaintiff *refused to provide any responses* to those
 20

21 _____
 22 a.m. on April 19, 2011, at the offices of plaintiff's counsel. Quinto Dec., ¶ 5 and
 23 Exhibit E hereto.

24 ⁷ Quinto Dec., ¶ 7 and Exhibit F thereto at 62-64.

25 ⁸ Quinto Dec., ¶ 7 and Exhibit G thereto. Le Château's belief that plaintiff
 26 would likely fail to respond to its discovery requests truthfully was based, in part, on
 27 its counsel's experience having plaintiff's principal, Jae Nah, held in contempt of
 28 court by Judge George H. King for backdating a critical document and submitting a
 perjurious declaration to hide his conduct. See Quinto Dec., ¶ 8 and Exhibit H
 thereto.

1 requests and, instead, merely asserted objections that, even if they had been
2 meritorious, would have been barred by plaintiff's failure to timely respond.⁹

3 Because plaintiff has failed to keep and/or refused to produce evidence
4 critical to many of the hundreds of copyright infringement cases it has brought, the
5 Court may infer that the evidence withheld would have been damaging to plaintiff's
6 case. *See Singh v. Gonzales*, 491 F.3d 1019, 1024 (9th Cir. 2007) ("When a party
7 has relevant evidence in his control which he fails to produce, that failure gives rise
8 to an inference that the evidence is unfavorable to him The adverse inference
9 rule is a generally accepted principle of law."); *United States ex rel. C.H. Benton,*
10 *Inc. v. Roelof Construction Co.*, 418 F.2d 1328, 1332 (9th Cir. 1969) (when a party
11 has relevant evidence within its control that it fails to produce, such failure gives
12 rise to an inference that the evidence is unfavorable to that party); Frank F.
13 O'Malley, Jay E. Grenig, and Honorable William C. Lee, *Federal Jury Practice*
14 *Instructions* § 104.27 ("If you should find that a party willfully suppressed evidence
15 in order to prevent its being presented in this trial, you may consider such
16 suppression in determining what inferences to draw from the evidence or facts in the
17 case"). *See also Stevenson v. Union Pacific Railroad Co.*, 354 F.3d 739, 746 (8th
18 Cir. 2004) (holding that in determining whether to impose an adverse inference
19 sanction, a court must consider (1) whether the record retention policy is reasonable
20 considering the facts and circumstances surrounding those documents, (2) whether
21 lawsuits have been filed frequently concerning the type of records at issue, and (3)
22 whether the document retention policy was instituted in bad faith).

23 Here, Le Château is entitled to an adverse inference. The reason plaintiff has
24 refused to provide evidence concerning any of the other patterns subject to its
25 copyright registration is obvious. The patterns were not "included in a single unit of
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27 ⁹ Quinto Dec., ¶ 9 and Exhibits I-J thereto.
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1 publication" and, therefore, plaintiff's claim is barred - as plaintiff and its counsel
2 knew long before they filed suit.

3 **III. THE ALLEGED INFRINGEMENT WAS DE MINIMIS AND, HENCE,**
4 **IS NOT ACTIONABLE**

5 Le Château is independently entitled to summary judgment for another
6 reason. It is well settled that *de minimis* copyright infringement is not actionable.
7 *Newton v. Diamond*, 388 F.3d 1189, 1192-93 (9th Cir. 2004). As the Ninth Circuit
8 explained, "even where the fact of copyright is conceded, no legal consequences
9 will follow from that fact unless the copying is substantial." Here, Le Château is
10 accused of infringing just 1 of 12 works, or 8.5% of the collective work at issue.
11 Because there is no claim that Le Château infringed the other 91.5% of the
12 collective work, there could not be a substantial infringement as a matter of law.
13 For this reason, as well, plaintiff's claims must be dismissed.

14 **IV. LE CHÂTEAU SHOULD BE AWARDED ITS COSTS AND**
15 **ATTORNEYS' FEES**

16 Section 505 of the Copyright Act provides that "the court in its discretion may
17 allow the recovery of full costs by or against any party." Further, "the court may
18 award a reasonable attorney's fee to the prevailing party as part of the cost."

19 In *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994), the Supreme Court
20 held that in exercising its discretion to award attorney's fees to prevailing copyright
21 plaintiffs or defendants, courts should take an "even-handed" approach that treats
22 both sides equally. The Supreme Court approvingly cited one circuit court's
23 consideration, as nonexclusive factors, of the losing party's "frivolousness,
24 motivation, objective unreasonableness (both in the factual and in the legal
25 components of the case) and the need in particular circumstances to advance
26 considerations of compensation and deterrence." *Id.* at 534, n.19, citing *Lieb v.*
27 *Topstone Industries, Inc.*, 788 F.2d 151, 156 (3d Cir. 1986).

1 Here, plaintiff has clearly pursued a frivolous, objectively unreasonable suit
2 for an improper motivation. It has always known that the Court lacks subject matter
3 jurisdiction.

4 Moreover, plaintiff knew how to correct the problem, had it wanted to do so.
5 In *L.A. Printex Industries, Inc. v. By Design, LLC*, No. CV 09-9320 R (AJWx),
6 plaintiff had registered a purported collection of published textile design patterns
7 pursuant to Certificate of Registration No. VAu 613-5916 on February 23, 2004.
8 However, to avoid the very problem at issue herein, plaintiff obtained a subsequent
9 Certificate of Registration, No. VAu 756-171, on July 16, 2010, that “removed” all
10 the patterns that were not at issue in the litigation, in the process conceding that,
11 contrary to the averments in the initial registration, the pattern at issue was
12 “unpublished.” See Quinto Dec., ¶ 11 and Exhibit M thereto.


13 Because an evidentiary hearing is ordinarily required to determine the amount
14 of any attorney’s fee award, see *Crescent Publishing Group v. Playboy Enterprises,*
15 *Inc.*, 246 F.3d 142, 147 (2d Cir. 2001), Le Château respectfully requests that the
16 Court award it attorney’s fees in an amount to be determined upon further briefing.

17 **Conclusion**

18 For the reasons set forth above, Le Château respectfully requests that its
19 motion be granted in all respects.

20
21 DATED: April 22, 2011

QUINN EMANUEL URQUHART &
SULLIVAN, LLP

22
23
24 By 
25 David W. Quinto
26 Attorneys for Defendant
27 Le Château, Inc.
28